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No. 96-904

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

Brian R. Zimmerman, *et al.*,

Petitioners,

v.

Volkswagen of America, Inc., and
Volkswagen Aktiengesellschaft,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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A. VOLKSWAGEN DOES NOT CONTEST OUR REASONS FOR GRANTING REVIEW.

In our petition for a writ of certiorari, we gave three reasons why this Court should grant review. First, we noted that, after twenty years of harmony regarding the Safety Act's preemptive effect, the federal courts of appeal and state courts of last resort are now hopelessly in conflict over (a) whether the Safety Act expressly preempts common law claims, (b) whether the Safety Act's savings clause precludes resort to implied preemption analysis, (c) whether the Safety Act impliedly preempts common law claims, and (d) if it does, which ones and why. Pet. at 7-16. Second, we explained that this Court's decision in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Freightliner*"), has created massive confusion over whether the Safety Act preempts common law claims -- confusion which only this Court can eliminate. Pet. at 16-22. Third, we said that whether the Safety Act preempts common law claims is an important question of federal law. *Id.* at 22-26.

Volkswagen does not contest *any* of these assertions. It does not deny that the lower courts are starkly split over the Safety Act's preemptive effect on common law claims. It does not *mention*, much less contest, our contention that *Freightliner* has lead to this unacceptable state. And it in no way challenges our assertion that the Safety Act's preemptive effect on common law claims is an important question of federal law. Indeed, how could it? Just over a year ago, in *Ford Motor Company v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996) ("*Tebbetts*"), Volkswagen and its fellow auto manufacturers urged this Court to decide whether compliance with Standard 208 preempts common law claims -- calling this "a question of national importance." Brief of the American Automobile Manufacturers Association and the Association of International Auto Manufacturers, Inc., as *Amici Curiae* Supporting the Petition at 18, *Tebbetts*, No. 95-709 (October Term, 1995).

Volkswagen, however, has an obvious reason for opposing review in this case: VW won below. That being so, VW argues

that review should be denied because (1) this case involves a lap belt, (2) this case involves only the question of express preemption, (3) the decision below is correct, and (4) this Court has denied review in other Safety Act cases. These arguments are meritless.

B. VOLKSWAGEN'S SEPARATE REASONS FOR DENYING REVIEW ARE MERITLESS.

1. Volkswagen's first argument is that review should be denied because this case involves a lap belt. According to VW, that fact alone renders the early Safety Act case law "irrelevant," distinguishes the more recent cases involving airbags, ameliorates the conflict among the lower courts, and makes this case "most inappropriate" for review. Opp. at 10-17. Nothing could be farther from the truth.

To begin with, in determining whether the Safety Act preempts plaintiffs' common law claims, this Court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 278, 280 (1978). Here, Congress made its intent exceedingly clear, saying: "Compliance with *any* Federal motor vehicle safety standard . . . shall not exempt *any* person from *any* liability under the common law." 15 U.S.C. § 1397(k) (emphasis added). These words admit of no exception. They do not permit courts to find some common law claims preserved and others preempted on the basis of the type of equipment involved in the case -- whether the equipment is a lap belt, an airbag, a shoulder harness, or even a rear-view mirror.

Similarly, 15 U.S.C. § 1392(d), upon which VW relies, prohibits a State from establishing "*any* safety standard applicable to the same aspect of performance" of a "motor vehicle or item of motor vehicle equipment" as an existing Federal motor vehicle safety standard unless the State standard is "*identical* to the Federal standard." Here, too, nothing in these words allows or authorizes the courts to draw lines, for the purposes of preemption, between lap belts, airbags, shoulder harnesses, or any other item of

equipment to which a Federal standard is applicable.

Thus, if Congress' intent is to be gleaned from Congress' words, the fact that this case involves lap belts (as opposed to airbags) simply does not matter. The legislative history of the Safety Act, moreover, reinforces this conclusion. It confirms both that section 1397(k) was intended to preserve *all* common law claims, *see* Pet. at 24, and that section 1392(d) was intended to preempt *all* State safety standards not *identical* to applicable Federal standards. *See* Opp. at 2-3.

In keeping with Congress' intent, every federal appeals court and state court of last resort to address the issue during the Safety Act's first twenty years held that Congress preserved *all* common law claims, without regard to the type of equipment involved. *See* Pet. at 8-10. Volkswagen contends that these unanimous early cases are "irrelevant" because, "[i]n virtually all of the cases cited, preemption was not at issue." Opp. at 12 n.8. That is not true. As the court said in *Holmes v. Century Products, Inc.*, No. HM-86-1008, slip op. at 13-14 (D. Md. Dec. 3, 1987): "Preemption is as preemption does, and when the question is whether compliance with federal safety standards is as a matter of law dispositive of liability issues -- and this is the question addressed by the Circuit Court cases -- the preemption issue is undoubtedly being addressed." The early cases *did* involve preemption and *do* conflict with the decision below.

Equally unavailing is VW's attempt to define away the recent, stark conflict among the lower courts by distinguishing between "no lap belt" and "no airbag" cases. The case law reveals that VW's distinction makes no difference. The "no-airbag" cases have been decided on grounds in no way limited to those devices. As we explained in our petition at 17, *and VW does not dispute*, the courts began finding "no-airbag" claims impliedly preempted in 1988 by employing the since-rejected approach to implied preemption adopted in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608

(1992). As we further showed in our petition at 18-20, *and VW does not dispute*, some courts continue to find "no airbag" claims preempted today because of the confusion caused by this Court's decision in *Freightliner*. These are precisely the same reasons that courts have found "no lap belt" claims preempted. As a result, the "no airbag" cases are being decided on grounds equally applicable to "no lap belt" cases -- and vice versa.

For example, the Supreme Court of Idaho's reasoning below applies just as powerfully to "no airbag" claims as it does to "no lap belt" claims. In Idaho, both types of claims are clearly preempted. *See Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Id. 1996). In New Hampshire and Indiana, the state courts of last resort have not considered whether "no lap belt" claims are preempted and need not do so. Those states' "no airbag" cases hold that the Safety Act preserves *all* common law claims, including "no lap belt" claims. *Tebbetts*, 165 A.2d at 345; *Wilson v. Pleasant*, 660 N.E. 327 (Ind. 1995). The other "no airbag" and "no lap belt" cases share the same trait. All are decided on grounds that would apply equally to both types of claims. *Compare, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 116 (3d Cir. 1990) ("no airbag" claims impliedly preempted because Standard 208 gave manufacturers the "option" to sell cars without airbags), *with Schlotz v. Hyundai Motor Co.*, No. C5-96-1207, 1997 WL 10318, *5 (Minn. App. Jan. 14, 1997) ("no lap belt" claims impliedly preempted because Standard 208 gave manufacturers the "option" to sell cars without lap belts). *See also Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272363 *16 (Miss. May 23, 1996), *petition for reconsideration pending* (filed June 19, 1996) ("no airbag" claims impliedly preempted because states "cannot have any nonidentical laws in any area which is being governed by federal law"). Indeed, in *Dykema v. Volkswagenwerk AG*, 525 N.W. 2d 754 (Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995), the Wisconsin Court of Appeals specifically found, at VW's urging, that there is no substantive difference for preemption purposes between "no airbag" claims and "no lap belt claims."

As *Dykema* illustrates, VW's attempt to distinguish "no airbag" cases from "no lap belt" cases is particularly disingenuous because VW consistently relies on "no airbag" cases to argue that "no lap belt" claims are preempted -- and consistently argues that both types of claims are preempted for exactly the same reasons. *See, e.g.*, Respondents' Brief in the Supreme Court for the State of Idaho at 19-25 (citing *Dykema* and equating "no airbag" and "no lap belt" claims). If review is granted, VW will obviously pursue the same course of conduct before this Court. Indeed, VW's opposition heralds such an approach. It argues that "no lap belt" claims are expressly and impliedly preempted for precisely the same reasons that courts have held "no-airbag" claims preempted. *See* Opp. at 21-27. In fact, not once does VW assert that the preemption question should be decided -- or even analyzed -- differently in regard to "no airbag" and "no lap belt" claims.[1]

Instead, VW advances two "practical" considerations which it says, warrant denial of review because this case involves a lap belt. First, VW argues that the impact of this case will be limited, since "only a relatively small number of automobiles" was sold without lap belts. Opp. at 14. Volkswagen, however, does not say how *many* cars were sold without lap belts (or even how many cars were sold without lap belts by VW). In fact, *over a million* cars were sold without lap belts. *See, e.g.*, U.S. Dept. of Transp., *Evaluation of The Effectiveness of Occupant Protection* 4 (June 1992). The majority of these cars, moreover, were sold by VW -- making the potential impact of this case on VW (and its customers) enormous. In any event, there is no reason to believe that the impact of this case will be limited to "no lap belt" cases,

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[1]VW does say that "some courts have indicated the ultimate dispute is different in 'no lap belt' cases," Opp. at 16 (quotation marks deleted), but it cites only *dicta* from *Alvarado v. Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995), *app. pending*, No. 95-0969 (Tex.). VW also says that the Solicitor General has taken different positions on "no airbag" and "no lap belt" claims, but VW does not advocate that approach and does not offer any reason why the Solicitor General's approach could not be adequately considered in this case.

particularly since VW never contends that cases involving lap belts and airbags should be analyzed or decided any differently.

This point is underscored by the second "practical" consideration stressed by VW: the "extended and unusual history of airbag development and regulation by NHTSA and Congress." Opp. at 16. Not once does VW assert that the supposedly-separate regulatory histories of airbags and lap belts (both of which were and are governed by Standard 208) would actually make any difference. The most that VW can say is "a decision in a 'no lap belt' case would not *necessarily* have broad, dispositive significance for 'no airbag' claims." Opp. at 16 (emphasis added). But, given Congress' clear words and VW's utter failure to articulate *a reason why* "no lap belt" and "no airbag" claims would be decided differently, that equivocal assertion carries no weight. The fact that this case involves a lap belt is simply not a reason to deny review.

2. Volkswagen's second argument is that review should be denied because only the question of express preemption has been preserved for review. Opp. at 17-18. This argument is frivolous.

In reality, both express and implied preemption were squarely presented to the courts below. The trial court found both express and implied preemption. Pet. App. 14-15. On review, the Supreme Court of Idaho said, "Because we find the Zimmermans' claims to be expressly preempted by the Safety Act, we do not address Volkswagen's contention that these claims are impliedly preempted as well." Pet. App. 8. Thus, even if express and implied preemption are properly viewed as separate questions, both were preserved for review by this Court.

Similarly, both express and implied preemption were encompassed within the petition and, therefore, properly presented to this Court. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Here, petitioners complied fully with that rule. The question presented, by its terms, raises the entire

issue of preemption; it does not separately mention, much less distinguish between, express and implied preemption.[2] Moreover, the petition discusses both express and implied preemption at length – in reviewing the conflict among the lower courts, the confusion caused by *Freightliner*, and the importance of the federal question presented. The petition even explains why the implied preemption decisions are wrong. *See, e.g.*, Pet. at 23 ("The decision below and the implied preemption decisions also contravene Congress' plain statement of intent.") Well aware of these facts, VW argues in its opposition that petitioners' claims are both expressly and *impliedly* preempted. Opp. at 21-25 (express), 26-27 (implied). The entire question of preemption is, therefore, plainly before this Court.[3]

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[2]The question presented is "Whether the National Traffic and Motor Vehicle Safety Act preserves common law claims from federal preemption by expressly stating that '[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law,' 15 U.S.C. § 1397(k); or whether, as the Supreme Court of Idaho held, *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), requires a finding that common law claims are preempted whenever an auto manufacturer complies with a Federal motor vehicle safety standard?" Pet. at i.

[3]While VW's argument is somewhat unclear, VW seems to be contending that the question presented fails to include implied preemption because it only offers the Court the choice of two rulings, neither of which is a finding of implied preemption. Opp. at 17. The specific choices offered in the question presented, however, do not matter as long as the question presented encompasses all of the issues or they are fairly included in the petition. For example, in *Freightliner*, 115 S. Ct. at 1483, the question presented was, "[w]hether the National Traffic and Motor Vehicle Safety Act preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992), forecloses such preemption." Petition for a Writ of Certiorari at (i), *Freightliner*, No. 94-286 (October Term, 1994). The Court granted review and rejected both choices set forth in the question presented, finding no preemption for entirely different reasons. *Freightliner*, 115 S. Ct. at 1487-88.

3. Volkswagen's third argument -- that the express preemption decision below is correct -- is not a reason for denying review. To the contrary, it starkly underscores the need for this Court to step in and provide guidance to the lower courts. For, as we explained in our petition at 7-16, until the decision below, every federal appeals court and state court of last resort to address the issue held that the Safety Act does not *expressly* preempt common law claims. The United States, moreover, agrees with those decisions. *See* Pet. at 24.

We will not address VW's express preemption argument on the merits further here. Our petition, Congress' plain words, and the unanimous appellate decisions all confirm both the error of the ruling below and the need for review. We must note, however, that two broad contentions advanced by VW in support of express preemption underline the critical federal questions at stake.

First, VW argues that section 1392(d) expressly preempts common law claims because, under *Cipollone*, *all* statutory language preempting state "law," "requirements," or "standards" *necessarily* preempts state common law claims. Opp. at 20. That argument, however, flies in the face of this Court's rulings and, if adopted, would result in a massive displacement of state common law. In fact, *Cipollone* held that state common law claims are *not* preempted by a 1965 statute providing that "[n]o statement relating to smoking and health . . . shall be *required*" by the States. *Id.* at 2618. And this Court's recent decision in *Medtronic Inc. v. Lohr*, 116 S. Ct. 2240 (1996), makes plain that *not* all statutory references to state "requirements" *necessarily* apply to common law claims.[4]

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[4]Volkswagen's suggestion, Opp. at 18, that review should be denied because the Idaho Supreme Court's decision below predated *Medtronic* is particularly odd, since the Idaho Supreme Court considered its ruling compelled by *Freightliner*, which was not overruled by *Medtronic*. *See* Pet. App. 7. We would not object, however, if this Court granted certiorari, vacated, and remanded for reconsideration in light of *Medtronic*. In *Ketchum v. Hyundai Motor*

Second, VW argues that section 1397(k) does not preserve common law claims because "general savings clauses" -- regardless of their terms -- *only* preclude a finding implied *field* preemption and *never* prevent a court from abnegating *any* state law that, in the court's view, conflicts with federal law. Opp. at 24-25. This argument would render Congress' words meaningless, dislodge preemption analysis from its moorings of Congressional intent, and leave Congress powerless to preserve *any* specific state law. It is hard to imagine an argument that raises more fundamental and important federal questions.

4. Volkswagen's final argument -- that this Court has denied review in other Safety Act cases -- simply ignores the facts. Three years ago, this Court granted review in *Freightliner*, which, by all appearances, seemed to present exactly the same question presented in this case: whether the Safety Act preempts common law claims. *See* footnote 3 *supra*. The Court ultimately decided the case on other grounds. *See id.*, 115 S. Ct. at 1487 n.3.

Since *Freightliner*, this Court has declined review in two Safety Act cases -- *Tebbetts*, 165 A.2d at 345, and *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996). In *Tebbetts*, the respondent successfully opposed review on the ground that the New Hampshire Supreme Court's decision finding no preemption was the first ruling by a state court of last resort or a federal appeals court on the preemptive effect of the Safety Act since this Court clarified the limits on implied preemption in *Cipollone* and *Freightliner* -- and that there was, therefore, no post-*Cipollone* conflict. Brief in Opposition at ii, *Tebbetts*, No. 95-709 (October Term, 1995). In *Montag*, the Tenth Circuit created such a conflict by finding preemption, but Ford successfully argued that review should be denied because the case was decided on alternative grounds and did not squarely present the

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Company, 57 Cal. Rptr. 2d 595 (Cal. App. 1996), the California Court of Appeal, drawing "guidance" from *Medtronic*, recently held that the Safety Act expressly preserves all common law claims.

preemption issue. Respondents' Brief in Opposition at v, *Montag* (No. 95-1885). Ford said this Court "should await a case that more appropriately presents the issue for consideration." *Id.* at 18.

This is that case.

CONCLUSION

For these reasons and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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